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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE GUALBERTO SILVA,

Defendant and Appellant.

C066973

(Super. Ct. No. 62086512)

Following the theft of a computer from his workplace, defendant Joe Gualberto Silva was charged by information with second degree commercial burglary and grand theft. (Pen. Code, §§ 459, 487, subd. (a).)¹ A jury found defendant guilty of both charged offenses. Sentenced to two years in state prison and ordered to pay restitution, defendant appeals, arguing the court erred in allowing the trial to proceed in his absence, ineffective assistance of counsel, evidentiary error, and sentencing error. We shall remand for modification of defendant's sentence; in all other respects, we shall affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2008 an employee of Capital Retail Solutions (Capital Retail), a software distributor, discovered a computer was missing. Subsequently, defendant was charged with second degree commercial burglary and grand theft. Defendant entered not guilty pleas. A jury trial followed. The following evidence was introduced at trial.

Capital Retail received a shipment of 15 Dell computers from the manufacturer on December 9, 2008. The normal company procedure is to log the serial numbers of the computers into inventory upon receipt. However, on this occasion the computers were just counted, with the serial numbers to be logged in the following day.

Capital Retail employees may arrive prior to the company's 8:00 a.m. opening only with authorization. Each employee, including defendant, possesses the pass code to disarm the alarm system.

Employee Kyle Oden arrived at the company at 8:30 a.m. on December 10, 2008. Oden discovered the shrink-wrap had been removed from the pallet containing the shipment of Dell computers. He discovered only 14 new Dell computers on the pallet and an empty box in place of one of the computers. Oden reported the missing computer to the two other employees in the office: Debra Owens and defendant.

That morning, when Owens arrived at work around 8:00 a.m., she found defendant alone in the office. His presence surprised Owens, since defendant's work hours were 8:00 a.m. to 4:00 p.m. Access records later revealed the alarm had been disarmed at 6:34 that morning.

Defendant wrote on his time card that he began work at 7:30. That day, defendant left work at 1:30, well before his scheduled leave time.

The co-owner of Capital Retail, Kimberly Souza, arrived that day between 10:00 a.m. and 11:00 a.m. Defendant appeared uneasy about something, but Souza thought it might have been because he locked his keys in his car. After learning of the

missing computer, Souza asked all employees for permission to search their vehicles. Souza had a “strong suspicion” that defendant was responsible, based on his early arrival.

Defendant became defensive when asked for permission to search his car and pretended the button that opened the trunk would not work. Souza noticed defendant was pretending to push the button and told him to “just press the button.” Defendant responded, “Don’t you think I know how to work my own car?” Souza, who thought defendant was becoming volatile and was somewhat frightened by the exchange, contacted the police. Defendant drove away.

Officer Joe Seawell arrived at the business and interviewed Souza and Owens. The following day, Seawell contacted defendant by telephone. Defendant told the officer that the company owed him money for hours and mileage. Defendant also stated Souza accused him of stealing a computer; defendant denied stealing it. According to defendant, Souza searched his car trunk and did not find anything. When Seawell asked defendant why he had not opened the trunk, defendant stated he had.

A day or two after the theft, William Souza, president of Capital Retail, spoke with defendant by telephone. Defendant admitted he took the computer because he had financial problems. Defendant told William Souza he had already sold the computer and spent the money. Defendant did not have permission to take or sell the computer. William Souza estimated the value of the computer at \$700.

Near the end of his shift on December 11, 2008, Seawell asked another officer, Neal Costa, to go to Capital Retail and attempt to arrest defendant. Costa placed defendant under arrest and transported him to the county jail. Costa interviewed defendant in the jail’s parking lot. After Costa read defendant’s *Miranda*² rights to him, defendant admitted stealing the computer.

² *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

The jury found defendant guilty of second degree commercial burglary and grand theft. The trial court denied defendant's motion for a new trial. The court sentenced defendant to the middle term of two years for commercial burglary. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's Absence

Defendant failed to appear at trial after his car broke down. Defendant argues the court erred in allowing the trial to proceed in his absence in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Background

On June 23, 2010, the second day of trial, defendant failed to appear. Trial counsel told the court, out of the jury's presence, that defendant was in Yolo County trying to get his car repaired.

The trial court found defendant voluntarily absent from the trial: "Well, at this time the first order of business is this: Is the matter going to continue? And, of course, [section] 1043[, subdivision] (b) of the Penal Code provides for the trial to continue when an individual is voluntarily absent. Whether his car breakdown is a voluntary absence is a matter that would be subject to some discussion and disagreement. [¶] I am going to find that he is in fact voluntarily absent, so the matter will proceed as far as argument and instructions and deliberations. [¶] I propose to explain to the jury [defendant's] absence by reason of what's been given to us: That he's got car problems. However, the Penal Code allows the Court to continue with the trial and that no adverse interpretation of [defendant's] absence can be maintained by the members of the jury. Agreed?" Defense counsel responded, "I have expressed [*sic*] consent from [defendant] to proceed in his absence."

Before the jury returned, the court continued: ". . . I will explain to the jury the reasons for the delay today. . . . And then I will explain to them that the Court is

authorized -- and, in fact, [defendant] has authorized these proceedings in his absence due to his vehicular breakdown and they are to draw no conclusion from his failure to be here.”

The court instructed the jury: “Ladies and gentlemen, you have probably noticed that [defendant] is not present with us this afternoon. We are informed that his vehicle has broken down and he is attempting to get that repaired and is on his way here. There is no reason not to accept that as a reasonable explanation for his nonappearance. [¶] The Penal Code allows the trial to continue under this circumstance in his absence. As a matter of fact, his attorney has indicated to the Court that he has expressly authorized the continuance of the trial, arguments and instruction and deliberations, in his absence. You are directed at this time to draw no adverse inference from [defendant’s] non-presence.”

In conjunction with his motion for a new trial, defendant provided declarations explaining the circumstances of his absence. Defendant’s car suffered two flat tires, and he was unable to put on his spare tire. As he walked to a nearby town, a passerby gave him some tire repair product and defendant attempted to fix the tires. He then drove slowly to the next town.

Defendant had contacted defense counsel by phone during his ordeal. At around 1:30 p.m., the time his trial was to resume, defendant again called his attorney. Defense counsel asked defendant if he should “continue” the trial. Defendant agreed counsel could continue the trial, but he believed that meant defense counsel could request a continuance, not that the trial would continue in his absence. Ultimately, the trial court found good cause to recall the warrant and reinstate bail.

Discussion

A criminal defendant has a federal and state constitutional right to be present at trial. (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.) In addition, a defendant has a statutory right to be present at trial. (§§ 977, 1043.)

Section 1043, subdivision (b)(2) permits a court, in a noncapital felony case, to proceed with trial in the defendant's absence provided the absence is voluntary. In addition, a defendant can waive personal appearance at trial and allow the trial to proceed in his absence. (*People v. Edwards* (1991) 54 Cal.3d 787, 809.)

A trial court abuses its discretion under section 1043 if it proceeds with the trial absent an adequate showing that the defendant's absence is knowing and voluntary. (*People v. Disandro* (2010) 186 Cal.App.4th 593, 602.) "A crucial question must always be, 'Why is the defendant absent?' This question can rarely be answered at the time the court must determine whether the trial should proceed. Consequently, in reviewing a challenge to the continuation of a trial pursuant to Penal Code section 1043, subdivision (b)(2), it must be recognized that the court's initial determination is not conclusive in that, upon the subsequent appearance of the defendant, additional information may be presented which either affirms the initial decision of the court or demands that defendant be given a new trial. It is the totality of the record that must be reviewed in determining whether the absence was voluntary." (*People v. Connolly* (1973) 36 Cal.App.3d 379, 384-385 (*Connolly*).)

On appeal, we must determine, on the whole record, whether defendant's absence was knowing and voluntary. We balance defendant's constitutional and statutory right to be present against society's interest in the orderly process of the court. (*Connolly, supra*, 36 Cal.App.3d at pp. 384-385.)

Here, the trial court determined defendant was voluntarily absent under section 1043 after learning defendant's car had broken down. In addition, defense counsel stated he had "expressed [*sic*] consent from [defendant] to proceed in his absence."

Defendant argues his predicament in missing his trial mirrors that of the defendant in *United States v. Mackey* (2d Cir. 1990) 915 F.2d 69 (*Mackey*), in which the Second Circuit Court of Appeals found the continuation of trial in the defendant's absence

constituted prejudicial error. In *Mackey*, on the evening prior to the first day of his retrial the defendant notified his attorney he was having difficulty obtaining a ride to court. Counsel informed the court, and the court delayed trial until 11:00 a.m. After a recess for lunch, the defendant had still not arrived; counsel requested an adjournment after explaining the defendant's problems in obtaining transportation to court, and the prosecution agreed with the request. The court then concluded: " 'The animals do not run the zoo. That's the simple answer. So then, your motion is denied and we will proceed.' " The defendant missed jury selection and all of the testimony of the government's first witness, as well as a portion of the testimony of the second witness. (*Id.* at pp. 70-71.)

The district court found the defendant voluntarily waived his right to be present and the reasons given for his failure to appear were insufficient. (*Mackey, supra*, 915 F.2d at pp. 71-72.) The Second Circuit disagreed, finding defense counsel provided the court with a plausible, verifiable, and essentially un rebutted explanation for the defendant's absence. The defendant's absence fell short of being knowing, voluntary, and without sound excuse. The court noted sound reason for absence had been found when the defendant did not know the correct starting date and when the defendant was detained in police custody. (*Id.* at pp. 73-74.) The court's error was not harmless, the Second Circuit concluded, because the defendant was absent during both jury selection and the testimony of potential government witnesses. In addition, the defendant's prior trial had ended in a mistrial and his acquittal on two of the three charges for which he was indicted. Therefore, the court reversed the judgment. (*Id.* at pp. 74-75.)

Defendant contends that, as in *Mackey*, his absence was due to a lack of transportation, circumstances outside of his control. Therefore, the court erred in finding his absence voluntary.

Here, however, unlike in *Mackey*, defense counsel informed the trial court that “I have expressed [*sic*] consent from [defendant] to proceed in his absence.” No such waiver appears in *Mackey*.

In his declaration in support of his motion for a new trial, defendant explained that he misunderstood what his attorney was asking him. Instead, defendant believed he was agreeing to a continuance, not a continuation of the trial. According to defendant, we must take into account subsequent “additional information” that may be presented once a defendant is again before the court. (*Connolly, supra*, 36 Cal.App.3d at p. 385.)

We agree that we review the totality of the record in determining whether a defendant’s absence is voluntary. (*Connolly, supra*, 36 Cal.App.3d at p. 385.) Even considering defendant’s explanation, we cannot find the court’s determination that defendant orally waived his presence to be unreasonable. Defense counsel conveyed what he believed his client told him, that defendant had agreed to the trial’s continuing without him.

However, section 977 requires a waiver of the right to be present to be in writing and executed in open court. But an oral waiver does not constitute reversible error in all cases and may be found nonprejudicial depending on the circumstances. The burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial. (*People v. Garrison* (1989) 47 Cal.3d 746, 782-783.)

Here, defendant was absent during closing arguments, the charging of the jury, and the reading of the verdict. Defendant argues his absence prevented him from assisting his attorney during closing argument and tainted the jury’s view of the evidence produced at trial.

According to defendant, defense counsel’s closing argument harmed his defense. He faults defense counsel for telling the jury he was “not offering any explanation for why [defendant] admitted to . . . stealing the computer.” Defendant notes other statements by defense counsel during closing that he claims were highly critical of him.

Defendant reasons that had he been present, it was highly unlikely counsel would have felt comfortable making such statements.

Defense counsel, faced with defendant's admissions that he stole the computer, attempted to defuse the impact of those statements. To counter the confession, defense counsel argued defendant made false confessions because he had problems telling the truth. These were not attacks on defendant's character, but an effort to convince the jury defendant was not guilty.

Defendant also argues his absence "induced the jury—consciously or unconsciously—to disregard the evidence that [defendant] did not form the intent to steal the computer prior to entry." However, all of the evidence defendant highlights was before the jury. In a similar vein, defendant argues there is a "reasonable possibility" the jury inferred from his absence that he was acknowledging guilt, especially since the jury was specifically instructed that it could consider flight as evidence of guilt.

These arguments ignore the court's specific instruction given in conjunction with defendant's absence. The trial court instructed the jury that defendant's absence stemmed from car trouble and they were to draw no negative inferences from his absence. We presume the jury understood and was able to abide by the court's instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.) Given the record before us, defendant's absence during closing argument, jury instructions, and the reading of the verdict neither prejudiced him nor deprived him of a fair trial.

Ineffective Assistance of Counsel

Defendant argues defense counsel performed ineffectively in failing to use the legislative change in the threshold between misdemeanor petty theft and felony grand theft to benefit defendant in plea negotiations. The Legislature changed the threshold for grand theft from \$400 to \$950; the computer defendant was charged with stealing was valued at \$700.

Background

When defendant was originally charged in December 2008 with grand theft, section 487 provided, in part: “Grand theft is theft committed in any of the following cases: [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400) [¶] (b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases: [¶] . . . [¶] [(1)(B)](3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates four hundred dollars (\$400) or more in any 12 consecutive month period.”

In 2009 the Legislature changed the threshold amount under subdivision (b)(1)(B)(3) of section 487 from \$400 to \$950. (Stats. 2009, 3d Ex. Sess. 2009, ch. 28, § 17 (Sen. Bill No. 3X 18, eff. Jan. 25, 2010).) In 2010 the Legislature changed the threshold amount for grand theft under subdivision (a) of section 487 from \$400 to \$950. (Stats. 2010, ch. 693, § 1 (Assem. Bill No. 2372, eff. Jan. 1, 2010).) The jury convicted defendant on June 23, 2010, and the court sentenced him on November 10, 2010.

Discussion

To establish ineffective assistance of counsel, defendant must show counsel’s performance was deficient and fell below an objective standard of reasonableness, and it is reasonably probable that a more favorable result would have been reached absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].) A reasonable probability is a “probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

According to defendant, counsel’s failure to realize the change in section 487 and to use this to defendant’s benefit constituted ineffective assistance of counsel. Under defendant’s argument, it is reasonably possible that the court might have reduced the

grand theft to misdemeanor grand theft, the count would have been reduced prior to trial, or the parties might have been able to negotiate probation rather than a jail term.

However, the trial court in sentencing defendant considered his grand theft conviction a misdemeanor. The court sentenced defendant to prison based on his felony conviction for burglary, his prior felony convictions, and several aggravating factors. Even if defense counsel had discovered the amendment to section 487 and brought it to the court's attention, there is no reasonable probability that defendant would have obtained a more favorable result. Therefore, we find no ineffective assistance of counsel.

Interview with Officer Costa

According to defendant, the trial court violated his federal rights under the Fifth and Sixth Amendments to the United States Constitution when it admitted his interview with Officer Costa. Defendant claims he never unambiguously waived his *Miranda* rights during Officer Costa's questioning.

Background

During trial, defendant moved to exclude his interview with Officer Costa as a violation of his *Miranda* rights. Officer Costa interviewed defendant in the parking lot of the jail after placing him under arrest.

The following exchange took place: “[Costa]: All right, Joe, before we go in, I want to read you your rights. Okay? You have the right to remain silent. Do you understand? [¶] Defendant: Um huh (affirmative). [¶] [Costa]: Anything you say may be used against you in court. Do you understand? [¶] Defendant: Um huh (affirmative). [¶] [Costa]: I’m going to need a verbal yes or not [*sic*]. [¶] Defendant: Yes. [¶] [Costa]: You have the right to the presence of an attorney before and during any questioning. Do you understand? [¶] Defendant: Yes. [¶] [Costa]: If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want. Do you understand that? [¶] Defendant: Yes. [¶] [Costa]: Having those rights in mind, do you want to talk to me about why you’re being placed under arrest?

[¶] Defendant: (Inaudible). [¶] [Costa]: You don't want to talk? [¶] Defendant: I, I mean, I, we already went over everything, you know? [¶] [Costa]: Okay. Why did you, why did you, uh, why did you steal the computer? [¶] Defendant: I was desperate.”³

During the hearing on the admissibility of the interview, the People argued defendant never clearly and unambiguously invoked his rights, and waived his rights by continuing to answer Officer Costa's questions. Defense counsel argued defendant's waiver was ambiguous, which prompted the officer to ask clarifying questions. Officer Costa's failure to obtain a clear waiver violated defendant's *Miranda* rights. The court concluded that, under the totality of the circumstances, Officer Costa had the right to continue the interview because defendant had the responsibility to unequivocally assert his wish to remain silent.

Discussion

Prior to custodial interrogation, a defendant must be warned of his or her *Miranda* rights. Unless a defendant is properly advised of these rights and voluntarily, knowingly, and intelligently waives them, statements made during custodial interrogation are inadmissible in a criminal trial to prove guilt. (*People v. Sims* (1993) 5 Cal.4th 405, 440.)

To determine whether a defendant voluntarily waived these rights, the court considers such factors as the nature, length, and location of the interrogation and the defendant's age, experience, and education; the defendant's physical, mental, and emotional state; and the defendant's capacity to understand the meaning and consequences of waiver. No one factor is dispositive. (*People v. Lewis* (2001) 26 Cal.4th 334, 383 (*Lewis*); *People v. Williams* (1997) 16 Cal.4th 635, 660-661.)

The People bear the burden to demonstrate the voluntary nature of the defendant's statement by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th

³ Officer Costa testified he could not recall what defendant said during the inaudible portion of the tape.

1005, 1033.) The court must consider whether the defendant was exposed to any form of coercion, threats, promises, trickery, or intimidation. (*Lewis, supra*, 26 Cal.4th at p. 383.)

In reviewing the trial court's decision, we accept the court's resolution of disputed facts and inferences and its credibility determinations if they are supported by substantial evidence. However, we independently determine from the undisputed facts and those properly found by the trial court whether the challenged statement was illegally obtained. (*People v. Johnson* (1993) 6 Cal.4th 1, 25 (*Johnson*); *People v. Guerra* (2006) 37 Cal.4th 1067, 1093.)

Here, the record reveals no coercion, threats, promises, or intimidation during the questioning by Officer Costa. Officer Costa informed defendant of his *Miranda* rights. Defendant acknowledged understanding the recitation of rights. It is the conversation which followed that defendant argues reveals a violation of his *Miranda* rights.

Defendant concedes, in the face of ambiguous invocations of the right to counsel, that an officer may continue talking with the suspect for the limited purpose of clarifying whether the suspect is waiving or invoking his or her *Miranda* rights. (*Johnson, supra*, 6 Cal.4th at p. 27.) However, defendant argues, "It is clear from Officer Costa's question—'You don't want to talk?[' [citation]]—that [defendant] gave him the impression that he did not want to talk to him. Further, in response to whether he 'wanted to talk,' [defendant] again gave a response indicating that he did not want to talk—that they had already gone over everything. [Citation.] However, instead of taking further steps to make certain that [defendant] was waiving his *Miranda* rights, Officer Costa simply proceeded with questioning. Such tactic is coercive."

Our analysis of the dialogue between Officer Costa and defendant yields a different result. Officer Costa advised defendant of his rights and asked if defendant understood them. Following defendant's inaudible response, Costa attempted to clarify whether or not defendant was waiving those rights by asking, "You don't want to talk?" Costa's statement did not, as defendant suggests, give the impression that defendant did

not wish to continue. Instead, Costa's question clearly gave defendant the opportunity to unambiguously assert his right to remain silent. Given this opening, defendant did not invoke his right to remain silent—a simple “no” would have sufficed for that purpose—but instead engaged in further conversation. We find neither coercion nor a violation of defendant's *Miranda* rights.

Sentencing Error

Denial of Probation

Defendant contends the trial court abused its discretion in denying him probation and instead sentencing him to prison. Defendant concedes he is presumptively ineligible for probation because of his two prior felony convictions but argues the particular circumstances of his case merit a grant of probation.

At sentencing, the trial court noted it had had lengthy discussions with counsel about the existence of any unusual circumstances to make defendant eligible for probation. The court noted that each of defendant's convictions, including the one at issue in the present case, involved violations of a position of trust: in each instance, defendant violated the trust of his employers. In addition, defendant was on probation when he committed the present offense. The court referenced the probation report, which noted defendant's justification for his crime was that his employer had cheated him on his salary. The court noted defendant had expressed no remorse.

Defense counsel had argued that the purpose of probation was to encourage a defendant to lead a law-abiding life. However, the court found, “Two grants of probation have not worked. [¶] Why should I believe that a third grant of probation will finally encourage [defendant] to lead a law-abiding life? [¶] . . . [¶] I don't see that a continuing or a further grant of probation is going to serve any useful purpose. . . . I don't see that the prior grants of probation have led [defendant] to lead a law-abiding life. The contrary is shown. He has not shown any sort of remorse or effort recompensing the victims in

this matter.” Therefore, finding no unusual circumstances justifying probation, the court sentenced defendant to two years in prison for second degree burglary.

We review a court’s sentencing decisions, including granting or denying probation, for an abuse of discretion. The trial court possesses broad discretion to determine whether a defendant is eligible for probation. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Section 1203 provides that, “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.” (§ 1203, subd. (e).)

Defendant argues the unusual circumstances warranting probation include the facts that the court reduced the grand theft charge to a misdemeanor and that his prior felony convictions were for nonviolent crimes. However, the trial court was well aware of these factors in making its determination to deny probation. The trial court instead focused on other factors: the violation of trust defendant’s crimes represented, the failure of prior grants of probation to convince defendant to avoid further convictions, and defendant’s failure to express remorse. We find no abuse of discretion.

Grand Theft Conviction

Finally, defendant argues his conviction for grand theft, count two, should be modified to misdemeanor petty theft because the evidence produced at trial failed to prove beyond a reasonable doubt that the computer was valued at \$950 or more. In addition, defendant contends the sentence should be stayed pursuant to section 654. The People concede each point.

At sentencing, the trial court reduced the grand theft conviction to misdemeanor grand theft. The threshold for felony grand theft is \$950, effective January 25, 2010. (Stats. 2010, ch. 693, *supra*.) Defendant was convicted on June 23, 2010, and sentenced

on November 10, 2010. As the People concede, the evidence at trial established the value of the stolen computer at \$700.

The parties agree that defendant's conviction should be reduced to misdemeanor petty theft. (§ 488.) Therefore, we shall direct the court to modify the judgment to reflect a conviction for misdemeanor petty theft. (§ 1260.)

The court also failed to impose a sentence on count two. The probation report recommended the sentence be stayed pursuant to section 654 since both offenses were based on the same conduct and pursuant to the same objective. Both sides agree, and we shall direct the court to impose and stay sentence on the petty theft conviction.

DISPOSITION

The case is remanded to the trial court to modify the judgment to reflect a conviction for misdemeanor petty theft on count two, to impose sentence on count two, and to stay the sentence on count two pursuant to section 654. The court is further directed to prepare an amended abstract of judgment and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MAURO, J.